

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, )  
                                  )  
Plaintiff,                 )                           CASE NO. 8:03CR505  
                                  )  
vs.                            )  
                                  )                           MEMORANDUM AND ORDER  
VICTOR SANCHEZ-GARCIA,    )  
                                  )  
Defendant.                 )

This matter is before the Court on the Defendant's Notice of Appeal (Filing No. 158).

The Defendant appeals from the Memorandum and Order (Filing No. 157) denying his motion for leave to file a tardy motion under 28 U.S.C. § 2255. Federal Rule of Appellate Procedure 24 governs the Defendant's ability to proceed in forma pauperis in this appeal.

Before the Defendant may appeal the denial of his § 2255 motion, a "Certificate of Appealability" must issue. Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA"), the right to appeal the denial of a § 2255 motion is governed by the certificate of appealability requirements of 28 U.S.C. § 2253(c). 28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue only if the applicant has made a substantial showing of the denial of a constitutional right:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—  
.....

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c).

A “substantial showing of the denial of a constitutional right” requires a demonstration “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were “adequate to deserve encouragement to proceed further.”” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)).

To the extent that a certificate of appealability is required in the context of the denial of a motion for leave to file a tardy petition, the Court issues this memorandum and order.

The issues raised in the motion for leave to file the § 2255 motion out of time were discussed thoroughly. For the reasons set forth in the Court’s previously issued memorandum and order (Filing No. 157) denying the defendant’s § 2255 motion, the Court concludes that the Defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c).

IT IS ORDERED:

1. A certificate of appealability is denied;
2. The Clerk of Court is directed to provide a copy of this Order to the Eighth Circuit Court of Appeals; and
3. The Clerk is directed to mail a copy of this memorandum and order to the Defendant at his last known address.

DATED this 23<sup>rd</sup> day of February, 2009.

BY THE COURT:

s/Laurie Smith Camp  
United States District Judge